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**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

IN RE:

MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,

Petitioner,

VS.

GENERAL MOTORS CORPORATION, et al.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN RE:

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AMF INCORPORATED,**

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vs.

GENERAL MOTORS CORPORATION, et al.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court have been separately filed by petitioner in the Supplemental Appendix. The opinion of the Court of Appeals, and the order unanimously denying the Petition for Rehearing and Suggestion for Rehearing En Banc, are reproduced in the Appendix to the Petition.¹

¹ References to the Petition and the Appendix to the Petition are cited as "Pet." and "Pet. App.", and to the Supplemental Appendix as "Pet. Supp. App." Unless otherwise noted, all emphasis is supplied.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1978. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 18, 1979. At the request of petitioner, the time to petition for certiorari was extended by this Court to August 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether this Court should review the determination of the Court of Appeals that the four-year period of limitation bars this 1970 action alleging a boycott "commenced" and "announced" in 1964 (complaint, ¶¶ 29, 35), when the record establishes that (1) each respondent did reject petitioner AMF's "afterburner" exhaust control device in 1964; (2) each respondent unequivocally so informed AMF at that time; (3) AMF as a result "cut back" its afterburner program and terminated "almost all" of its afterburner personnel at the end of that year; (4) AMF concluded at that time that its rejection was the result of a conspiracy to boycott; (5) AMF was at that very moment able to predict "very, very precisely" the dimensions of the vehicle market from which it had been excluded; and (6) AMF's ability to prove with requisite certainty the existence and amount of its alleged damages became more rather than less speculative with the passage of time since 1964.

STATEMENT OF THE CASE

On October 23, 1970, petitioner AMF, Inc. filed this action against respondents,² claiming that they had conspired

² General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and the Automobile Manufacturers Association (now the Motor Vehicle Manufacturers Association of the United States, Inc.).

to boycott an afterburner exhaust control device invented and developed by an individual named Charles Morris in collaboration with the Chromalloy Corporation, and later, AMF. The AMF case was coordinated for pretrial discovery with a number of previously filed city and state cases relating to the alleged conspiracy, but at AMF's request, its case remained on the "back burner" while the city and state cases were litigated. After they were dismissed by the District Court in 1973 (*In Re Multi-district Vehicle Air Pollution*, 367 F.Supp. 1298 (C.D. Cal. 1973), *aff'd* 538 F.2d 231 (C.A. 9, 1976)), discovery in the AMF case was renewed by both parties.

At the conclusion of extensive discovery,³ respondents moved for summary judgment. The District Court granted respondents' motion on a number of grounds,⁴ including the statute of limitations.

³ Over 100 depositions were taken, and over 250,000 pages of documents were produced to plaintiff.

⁴ The District Court granted respondents' motions for summary judgment on a number of grounds besides the statute of limitations. Its conclusions of law included the following (Pet. Supp. App. 29b-30b):

- "8. Defendants were entitled to reject AMF for business reasons sufficient to each.
- 11. AMF did not meet the condition precedent to entry into the marketplace, namely certification of a production device by the State of California. The experimental prototype was also decertified.
- 13. AMF never had a device to be the subject of any boycott.
- 16. AMF cannot prove that any AMF device would have been used under any circumstances.
- 23. AMF was not injured by, or can it prove any damages as a result of, any unlawful acts of defendants."

The Court of Appeals did not find it necessary to reach these points, on any one of which the District Court's order granting summary judgment could have been sustained.

AMF appealed that decision to the Court of Appeals for the Ninth Circuit, and that Court affirmed. (Pet. App. 1a). Finding the action to be barred by the statute of limitations, the Court found it unnecessary to review the several other grounds supporting the summary judgment below. AMF's Petition for Rehearing and Suggestion for Rehearing En Banc was denied. The full Court was advised of the suggestion for en banc rehearing, and no judge of the Court requested a vote on the suggestion. (Pet. App. 16a).

THE FACTS

In 1959 and 1960, the California legislature directed the California Department of Public Health to promulgate standards for vehicle exhaust emissions and created the California Motor Vehicle Pollution Control Board ("the Board"). Under the law, one full model year after the Board certified two devices as enabling vehicles to meet the standards, all new passenger cars sold in the State of California would have to be certified as being in compliance with those standards. (R. 4031, 4035; Pet. Supp. App. 4b-5b).

Beginning in 1961 and continuing thereafter, the Board tested exhaust control devices submitted by many companies without success until June, 1964, when, after the Board relaxed its standards, it was able conditionally to certify four devices for use on 1966 models. (Pet. Supp. App. 5b-6b). Three of these were catalytic converters and the fourth was the prototype Morris/Chromalloy/AMF "afterburner."

The prototype AMF device certified in 1964 was not the device that AMF intended to develop, manufacture, and sell to respondents. Rather, the temporarily certified—and

subsequently decertified⁵—device was a large "experimental" model that differed substantially from AMF's subsequently proposed much smaller "production" device which was never certified. Indeed, AMF never submitted it to the Board for approval. (Pet. Supp. App. 7b). (See Figure 1 on page 6).

⁵ At the time the Board certified the experimental AMF device in June, 1964, the Board recognized that the device had substantial shortcomings that could only be overcome by compulsory annual maintenance, and the Board conditioned certification upon adoption of a scheme of mandatory maintenance. (Pet. Supp. App. 5b-6b). In September 1965,—at the very beginning of the 1966 model year—the California legislature withdrew from the Board all authority to enforce compulsory maintenance of exhaust devices, and the Board thereupon effectively decertified the AMF device and the three catalytic converters previously certified. (R. 3540). The Board's decertification made use of the AMF afterburner illegal under California law, (Pet. Supp. App. 6b). (See, e.g., Calif. Stat. 1960, 1st Ex. Sess., c. 23, p. 350, ¶1, former California Health & Safety Code §24395, now §39130).

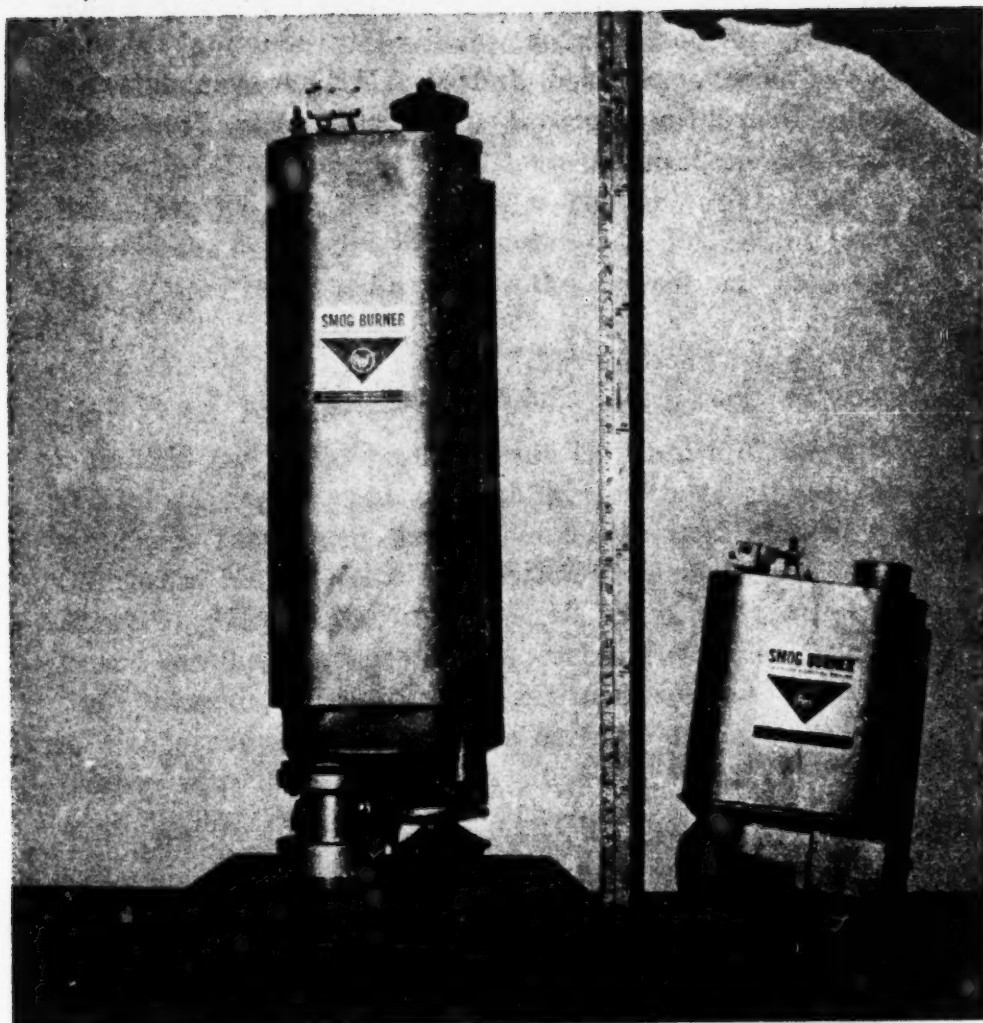


Figure 1

Conditionally Certified
Prototype Model

Uncertified Proposed
"Production" Model

Engineers from each vehicle manufacturer tested sample devices provided by AMF. American Motors alone received a version of a smaller production device; other companies were given samples of the larger experimental device. Because of poor test results, each defendant decided in 1964 to use control systems other than AMF on its 1966 models and so informed AMF at that time—six years prior to AMF's suit.

American Motors. American Motors first requested a sample of the AMF afterburner in November, 1962, but AMF refused to submit units to any vehicle manufacturer until an "improved" prototype could be developed. (R. 3531; Pet. Supp. App. 9b). Although AMF promised at that time to make a device available for testing "after the first of the year [1963]" (R. 3531), AMF persisted in its refusal to provide a device until 18 months later, in May 1964. (Pet. Supp. App. 13b). The reason for this continued refusal was the existence of unsolved problems with the AMF device.⁶

In June 1964, AMF finally made the large experimental model available for evaluation by American Motors. Tests proved that it did not meet the California emissions standards on American Motors Cars:

"Of the four units which we have on test, three do not meet the standard; and the remaining one, while it met the standard, failed and had to be returned to the supplier.

⁶Lipchik (AMF) Deposition 21; Seltzer (AMF) Deposition 65. Charles Morris, the inventor of the AMF device, testified that he disagreed strongly with AMF's decision to withhold the device from the defendants:

"I said, 'Also I think we should be doing something to work with the auto industry in this thing. . . .

"If you do not have their confidence or build their confidence in what it can do and it can stand up, then they are certainly not going to buy it." Morris Deposition 77.

"The supplier said that this failure should not be counted against them since *it did not represent the final design.*"⁷

Nevertheless, American Motors continued to test AMF devices. In September, 1964, it actually received a version of the AMF "production" unit, and several were installed on American Motors vehicles. All were removed after less than 200 miles of testing because they were unable to meet emissions standards or rendered the vehicle undrivable. (Pet. Supp. App. 13b; R. 3534; 4199-4200). As a result, on October 26, 1964 (R. 4198) American Motors rejected the AMF afterburner for these reasons, as well as because its "flame-throwing" characteristic (*i.e.*, its tendency to belch fire from the exhaust) made it an unmarketable product.⁸ (Hittler (AMC) Deposition 166, 381-386).

AMF employees themselves conceded the poor performance of these last devices furnished to American Motors. Ralph Davis, the senior AMF engineer on the afterburner project, testified that:

"... the later devices, some of the last devices we sent to Detroit, the performance was rather poor."⁹

⁷ American Motors, Flame Afterburner—American Machine and Foundry, August 5-September 1, 1964, at 1-2; R. 3533.

⁸ The device also burned a hole in the floor mats and rear seat of an International Harvester vehicle. (Pet. Supp. App. 14b).

⁹ Davis Dep. 89. Charles W. Morris, the inventor of the AMF afterburner, also testified that testing of the proposed AMF "production" device produced "a rather sorry looking test specimen." Morris Dep. 171. Indeed, Mr. Morris described the outermost tubes in that device "to be warping on the outside and the inner ones were in a few cases rather truncated with jagged upper edges. . . ." Morris Dep. 177.

Even putting the AMF device in its best light, counsel for AMF had to admit to the District Court that "It was not ready to finally install on an automobile, your Honor . . . it had a commercial potential." (Transcript of Proceedings, January 19, 1976, at 34).

Ford. Beginning in the early 1960s, Ford requested that AMF submit a sample afterburner to it for testing. AMF refused until June, 1964.¹⁰ (Pet. Supp. App. 12b). By then, Ford engineers, who had been working on air injection as early as the late 1950's, believed that air injection would be the preferred system in complying with their management's directive:¹¹

"... [W]e predict at this time that we will be recommending the Thermactor air injection approach for Job #1, 1966."¹²

Subsequently, AMF furnished samples of the bulky experimental units for installation on three Ford vehicles. These units failed to meet carbon monoxide standards on two of four tests.¹³ Ford requested samples of the smaller so-called "production" device. AMF never furnished any "production" units at all to Ford. (Pet. Supp. App. 12b).

Ford knew in the summer of 1964 that the lead time required to engineer an emission control system for installation on 1966 model Ford vehicles to be sold in California, which would first roll off the assembly lines in July 1965, was getting short.¹⁴ For this reason Ford engineers stated

¹⁰ AMF's refusal to do so earlier reflected the views of its president in 1963 who "did not think this was the proper time to approach the automobile manufacturers" because he believed that AMF "should not demonstrate merchandise . . . [when] you are 'encountering annoying difficulties'." (Gott Dep. Ex. 5).

¹¹ See Pet. Supp. App. 12b-13b.

¹² E. Horton, Implications of Recent California Decision on Company Smog Control Plans, June, 1964 at 1 (R. 3525).

¹³ Ford Engine and Foundry Division Product Engineering Office, Report on Vehicles Equipped with California Approved Hang-On Devices, October 29, 1964, at 6 (R. 3525-3526); Hagen Affidavit ¶4; (R. 3590).

¹⁴ AMF was fully aware of the need for substantial lead time. On May 3, 1964, for example, W. M. Kennedy, an AMF automotive consultant, informed AMF that the lead time for the automobile companies after receiving production samples from AMF would be a minimum of 12 months and probably longer. (Gott Deposition Ex. 10).

that their judgment, based on an accumulated four years of experience with air injection, was that the Ford air injection system was the system upon which Ford should concentrate:¹⁵

“At the point in time that we decided what would go on the 1966 vehicles [Summer 1964], we considered [air injection] to be the best system we knew how to put on at that point in time.”

Indeed, when in 1964 Ford decided to use air injection, Ford rated the AMF afterburner dead last among the four systems Ford considered (air injection, engine modifications, the Walker catalytic converter, and the AMF afterburner, in that order) (Misch Dep. Ex. AHM2; Chandler Dep. Ex. AJMC 36).

General Motors. During the 1950's and 1960's—many years before AMF even entered into its joint venture with Chromalloy—the General Motors Research Laboratories built and tested experimental afterburners, as a result of which General Motors scientists and engineers concluded that direct flame afterburners such as the AMF device were “unlikely to work in any configuration.”¹⁶ (Pet. Supp. App. 9b).

More promising than afterburners, in the view of General Motors' engineers, was the concept of exhaust manifold air injection, upon which General Motors began working in 1959¹⁷ (Pet. Supp. App. 9b). In February, 1964—four months prior to the first submission of sample afterburner hardware by AMF to General Motors—the General Motors Engineering Policy Group, with the concurrence of the Executive Committee of the General Motors Board of

¹⁵ Hagen Affidavit ¶¶7-9 (R. 3591-3593), Chandler Deposition 744-45; Misch Deposition 465-66, 531.

¹⁶ Caplan Deposition 17-20, 37-38, 68; Caris Deposition 215-16.

¹⁷ Caris Deposition 263-70.

Directors, decided that air injection was to be the system utilized by General Motors in meeting the California standards. (Pet. Supp. App. 9b).

At that time, AMF had not even submitted an afterburner sample for evaluation by General Motors. Although General Motors had been requesting such a sample for years,¹⁸ AMF continued to refuse to provide one until June, 1964. As a result, General Motors was already committed to air injection when AMF finally submitted an experimental afterburner prototype for evaluation in June, 1964. (Pet. Supp. App. 10b).

Nonetheless, General Motors tested the experimental prototypes that AMF finally submitted—with negative results. Not only did the afterburner not operate during all driving conditions, but it was considered by General Motors engineers to be “very marginal” on controlling carbon monoxide. Further, the carburetor setting insisted upon by AMF as necessary to meet the California emissions standards caused what General Motors engineers considered to be unacceptable vehicle “surge” at cruising speeds. As a result, General Motors remained committed to air injection.¹⁹ (Pet. Supp. App. 10b). As stated by Mr. Caris, the engineer in charge of the General Motors Power Development Section wherein the AMF device was evaluated:

“The evaluation demonstrated that the AMF device was inferior to air injection. Accordingly, I had no reason to suggest to anyone in General Motors management that the earlier design objective to use air injection be changed and I did not do so.”²⁰

¹⁸ Caplan Deposition 55-56; Caris Deposition 218.

¹⁹ Homfeld Deposition 243-46; Caris Deposition 223; Caris Affidavit ¶8; Homfeld Affidavit ¶7 (R. 3567-3568); Johnson Affidavit ¶¶6-7 (R. 3574-3575).

²⁰ Caris Affidavit ¶8 (R. 3571).

Chrysler. During the 1950's and 1960's Chrysler also conducted extensive research on afterburners, developing designs of its own as well as cooperating in joint development efforts with suppliers. (Pet. Supp. App. 11b). Chrysler's Charles Heinen, a man characterized by California officials as "an evangelist"²¹ with respect to emission controls, testified:

"Rather a large continuum of experimental [afterburner] devices that we tried . . . I mean which one do you want to talk about? I can give you almost every conceivable design, and we tried it at one time or another." (Heinen Dep. 1165-1166).

The failure of these efforts caused Chrysler to become discouraged with the prospects for afterburners as early as 1961—even prior to AMF's entry into work with Charles Morris and Chromalloy. (Pet. Supp. App. 11b). As Mr. Heinen testified:

"Q. On or about the date of Exhibit 50 [October 1961] you were becoming disenchanted with the prospects of successfully applying the principle of a flametype afterburner, is that correct?

A. It kept flaming out on me, yes. Everything we tried kept flaming out on me, and so I was getting a little discouraged. I tried every material that I thought was known to man at the time.

I didn't give up on it, as you know, but I was getting pretty darned discouraged with it, yes." (Heinen Dep. 1164-1165).

More promising than afterburners—or any other control system—in Chrysler's view, was a system of engine modifications developed by Chrysler and known as the "Cleaner Air Package." Chrysler submitted that system to the California Board for certification in July, 1963—more

²¹ Sweeney Deposition 33; Hass Deposition 591.

than eight months prior to AMF's application on the AMF device that was eventually conditionally certified²²—and Chrysler received unconditional certification for that system in November, 1964.

Chrysler was far down the road with its Cleaner Air Package when in July, 1964, it received an AMF sample of the "experimental" unit for testing. Chrysler requested but never received a sample of the AMF "production" device. (Pet. Supp. App. 11b; R. 3415-18).

When Chrysler tested the experimental AMF device it proved unsatisfactory on Chrysler vehicles, as "AMF people" admitted to Heinen. (Heinen Deposition 1152-1153; 1243-1245; Fagley Deposition 133-39; Ulyate (AMF) affidavit ¶8; R. 4154-55). Heinen testified:

"Q. Was it your opinion on November 25, 1964 that the AMF unit had failed the tests?

"A. Yes. The full test, including back pressure and all the rest. It was also the opinion of the AMF people; that's why they wanted to take it back and work on it. So they told me anyhow.

• • •

"[T]hey requested us to take it off, they'd go back, they'd work on some of the things they'd found out during our testing, they'd replace it with another unit."²³

They never did. (A. 10).²⁴

²² R. 3521; Heinen Deposition 111.

²³ Heinen Deposition 1242-1244.

²⁴ AMF conceded in its answers to interrogatories that foreign vehicle manufacturers were not parties to the alleged boycott (R. 3051). These manufacturers, like respondents here, tested and rejected the AMF device. Harold Lipchik, who was in charge of the AMF afterburner project, confirmed that the AMF device was rejected by several foreign manufacturers (Mercedes Benz, Toyota, Volvo, and Rover) whom AMF admits were not parties to the alleged boycott. (Lipchik Deposition, 190-94).

Each of the respondent vehicle manufacturers informed AMF in 1964 that its device had been rejected (Pet. Supp. App. 156).—Chrysler “prior to the 24th” of June; Ford and General Motors by at least August 12; and American Motors on October 26.²⁵ As a result of these rejections, and as a result of an October, 1964 California Board refusal to trigger the law for used cars, AMF then “cut back” its afterburner program and “terminated” almost all of its afterburner personnel in December 1964.²⁶ AMF also refused to attend a January 7, 1965 California Board hearing on exemption requests for certain limited production vehicles because of its “conviction that no orders for [AMF’s] Smog Burner would emanate from any Detroit manufacturer.” (R. 2921; AMF Answer to Interrogatory 71.)²⁷

At the time of its rejections by respondents, AMF already knew the dimensions of the market it had lost. As testified by Harold Lipchik, AMF’s Vice President and the General Manager in charge of the afterburner project:

“... There is some association that puts out sales data, automobiles throughout the United States, state by state, model by model, *great reams of data*. I forget who did it.

Q. ... [Y]ou were able to predict what the [vehicle] market was?

²⁵ Heinen Deposition 1374-75; R. 3021-22, 3549.

²⁶ Lipchik Deposition 11, 167-70; R. 3550-3551.

²⁷ In the light of this record, the District Court concluded:

“* * * no six people in the jury box, from the facts which are set forth in this record, could reasonably come to the conclusion that the production model of AMF would receive California approval. Can’t do it.” (Transcript of Proceedings, January 19, 1976, at 60).

A. Very, very precisely, I would say, because that data was available historically²⁸

Also, at that time, AMF had concluded that it had been excluded from this market because of a conspiracy to boycott.²⁹

Despite the foregoing, AMF filed no lawsuit whatever during the ensuing four years—notwithstanding articles in national newspapers (noted by AMF) reporting allegations and investigations relating to vehicle manufacturers’ work on emission controls,³⁰ and notwithstanding receipt by AMF of a subpoena from a Los Angeles federal grand jury investigating the subject of vehicle emission controls.³¹

Ultimately, AMF waited over six years after its rejection by respondents, over six years after being informed of these rejections, over six years after concluding that it would receive no orders from respondents, almost six years after “cutting back” its afterburner program and terminating “almost all” of its afterburner personnel, and over six years after concluding that it had been a victim of a conspiracy to boycott before filing this suit. In the interim, AMF destroyed and/or gave away great quantities of documents and hardware, thereby impairing evidence, including

²⁸ Lipchik Deposition 51-52. This was confirmed by AMF’s Business Manager. Seltzer Deposition 43-44.

²⁹ Lipchik Deposition 5-7, 10-11, 298, 345-46; Robins Deposition 58-59, 61.

³⁰ E.g., AMF Memorandum, September 15, 1964, at 2 (R. 3559); *Los Angeles Times*, January 20, 1965; *Wall Street Journal*, April 7, 1966.

³¹ Coffey Deposition 7, 10, 18-19.

particularly the recollection and testimony of numerous AMF witnesses.³² (Pet. Supp. App. 166-186).

AMF's petition refers to several incidents occurring after January 10, 1965. We show at pp. 21-23, *infra*, that these few episodes did not constitute continuing conspiratorial conduct; that they did not establish that respondents' prior rejections of petitioner's product were not final; and that they caused petitioner no new injury.

³² The policy of the statute of limitations, of course, is to prevent the destruction of evidence, which is precisely what happened in this case.

REASONS FOR DENYING THE PETITION

The decision below turns on the application to the peculiar facts of this case of the principles pronounced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971), with respect to the statute of limitations governing antitrust cases. The Court of Appeals' opinion demonstrates that it painstakingly followed *Zenith*, and that its application of the *Zenith* principles was entirely reasonable. The decision is fully consistent with the cases in other circuits which petitioner asserts to be in conflict with it, in none of which did the facts bear any resemblance to those at bar. All of the cases, including the decision below, are consistent with *Zenith* and with each other in applying the *Zenith* principles to different sets of facts. No general question of law is presented. Since there is no conflict of decision and the case turns upon its facts and was correctly decided, no grounds for granting certiorari have been shown.

Petitioner asserts (and the Court of Appeals assumed) that the cut-off date for the statute of limitations is January 10, 1965.³³ (See Petition fn. 7, p. 10). Petitioner seeks

³³ The government civil suit filed on January 10, 1969, did not allege a group boycott, however. See the Complaint in *United States v. Automobile Mfr's Assn., Inc.*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom. City of New York v. United States*, 397 U.S. 248 (1970). As conceded by AMF in its brief in the Court of Appeals:

"While various other cases were brought against the same defendants, including a Department of Justice civil action, the AMF case was *the only one* claiming market foreclosure. . . ." (Opening Brief, p. 1)

In this circumstance, the statute of limitations as to AMF was not "tolled" by the government civil suit filed on January 10, 1969. The Court of Appeals did not find it necessary to reach this point, however, because it found that petitioner's claim was already time-barred by January 10, 1969. (Pet. App. 6a, n.1)

to avoid the bar of the four-year limitation statute on two theories:

- (1) That respondents' alleged concerted refusal to deal with petitioner continued after January 10, 1965; and
- (2) That petitioner's damages were speculative and unascertainable on that date, and that therefore petitioner is entitled to prove its damages now.

Neither of these positions is well taken. Our discussion of these issues will also show that the lower courts did not err in holding that respondents were entitled to summary judgment.

1. Petitioner's first contention is that the court below disregarded the holding in *Zenith* as to the effect of a continuing conspiracy, and that its decision is in conflict particularly with the decisions of the Fifth Circuit in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (C.A.5, 1975), cert. denied 423 U.S. 1054 (1976), and *Imperial Point Colonnades Condominium v. Mangurian* 549 F.2d 1029 (C.A. 5, 1977), cert. denied 434 U.S. 859 (1978). To the contrary, the *Zenith*, *Poster* and *Mangurian* cases were the precise sources relied upon by the court below for the principles which it applied to petitioner's allegations of continuing conspiracy. (See Pet. App. 7a, 9a and 10a)

As stated in *Zenith* (401 U.S. at 338) and quoted below (Pet. App. 7a):

"Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the

antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

The petition (p. 15) seems to regard the statement in *Mangurian* (549 F.2d at 1035) that "no new cause of action accrues for the damages occurring within the limitations period *because no act committed by the defendant within that period caused them*" (emphasis the court's) as in some way inconsistent with the decision below. The court below, however, relied on the expression of exactly the same concept in the preceding sentence in *Mangurian*, which reads as follows:

"[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff*." (Emphasis the court's.)

On the same page, the Fifth Circuit's *Mangurian* opinion noted that, in *Poster*, "we distinguished cases where all the damage complained of by plaintiff necessarily resulted from an initial pre-limitation act." *Mangurian* (at 1035) quoted from *Poster* (517 F.2d at 128) the statement also quoted by the court below, which exactly fits this case, that:

"It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action."³⁴

³⁴ Petitioner also claims conflict with the Third Circuit's decision in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 137 (C.A. 3, 1978). *Friedman*, however, quotes the statement (footnote continued)

Each of these statements of the law supports respondents' position here. See also *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F. 570 (C.A. 4, 1976); *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F. 2d 196, 208 (C.A. 9, 1950), cert. denied 340 U.S. 943 (1951); *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (C.A. 6, 1963), followed in *Sherman v. Goerlich's, Inc.*, 341 F.2d 988 (C.A. 6, 1965), cert. denied 382 U.S. 830 (1969). The cases relied upon in the petition illustrate the application of the continuing conspiracy principle but in no way conflict with the decisions below in the case at bar.

Here, each automobile manufacturer's complete rejection of plaintiff's afterburner occurred in 1964 while each company was designing its new models for retail sale in September or October, 1965. Any devices to be added had to be coordinated with the basic structure before designing and tooling became final, and this required ample lead time before production of the finished automobiles. Significantly, after each of the manufacturers had refused to purchase petitioner's afterburner, AMF manifested its own awareness that these were definitive rejections by the automobile manufacturers by "almost a complete reduction of personnel" assigned to the afterburner program. Also, AMF attempted to "seek other business and other jobs for the persons who were involved." This occurred "very shortly thereafter December [1964] is the

(footnote continued)

in the introductory sentence to the same paragraph of *Mangurian* that "a cause of action accrues each time a defendant commits an act that injures plaintiff." 587 F.2d at 139, quoting 549 F.2d at 1035. *Friedman* concluded that "the position of the Fifth Circuit is well-reasoned, and we adopt it." The Tenth Circuit in *Fitzgerald v. General Dairies, Inc.*, 590 F.2d 874 (C.A. 10, 1979), upon which the petitioner also relies, in its brief paragraph on this point (p. 876) does little more than cite *Zenith* and *Mangurian*.

termination of the group of people." Lipchik Dep. 11, 167-170. (Mr. Lipchik was the General Manager in charge of AMF's Smog Burner program.) There were no comparable facts in *Mangurian*, *Poster* or *Fitzgerald*.

None of the acts occurring after January 10, 1965 upon which petitioner relies as continuing conspiratorial conduct within the statutory period establishes that the manufacturers' 1964 rejections of petitioner's product were not final or that petitioner could possibly have supplied a certified working device in time for the 1966 model year.³⁵

(a) The petition says that in April, 1965 Ford rejected an AMF offer to supply Smog Burners. The entire evidence on this incident was that in answer to an oral inquiry to two Ford engineers by an AMF representative as to "whether Ford had any new interest in the AMF-

³⁵ Petitioner now asserts that its claim for damages is not limited to that year but extended to future years. After June 1965, however, all of the systems selected by respondents had been certified by the California Board, and petitioner's device never was. Thus it never could lawfully have been used. Furthermore, on September 10, 1964, after AMF's experimental prototype had been rejected by respondents, Mr. Lipchik informed AMF employees that AMF had never expected to sell afterburners for more than "one year." As stated by Mr. Lipchik in his memorandum to AMF employees on that date:

"The SMOG BURNER was designed specifically for both new and used cars because we never believed that the new car market would be very big or last very long. We felt that, *at best*, we could only count on *one year* of new cars and we made our plans based on this approach."

Mr. Lipchik testified that this memo was truthful. Lipchik Deposition 160. Mr. Lipchik further testified that the reason AMF planned on no more than one year of new car sales was because "we had felt that in time the manufacturers would either by new engines or other improved engines come up with *their own approaches*." *Ibid.*

Chromalloy Smog Burner," he "was told that although we were not connected with the production release activities we knew that Ford was not . . . interested in undertaking additional developmental testing of the Smog Burner at this time." (R. 5831). This hardly constitutes an additional rejection of the Smog Burner for a period different from that covered by the 1964 rejection when Ford had determined to use the system then found to be the most feasible.

(b) The Petition asserts that defendants engaged in "predatory below-cost pricing in July, 1965, specifically aimed at foreclosing AMF's device from the market." (Pet. 16). Whether or not the manufacturers lost money on their anti-pollution devices,³⁶ nothing in the record shows that their prices in July, 1965, or thereafter, were in any way aimed at foreclosing AMF's non-existent device from the market. That would have been the least of their worries at that time.

(c) The reference to the joint development of an air pump in 1965 is equally irrelevant. Ford and American Motors used the pump developed by General Motors—very reluctantly insofar as Ford was concerned (R. 4511-4515)—because it was the best available. Nothing in the record suggests that, if they had not done so, they would have turned to AMF's Smog Burner.³⁷ Ford, for example, the only manufacturer even to *rank* the AMF device, had previously listed that device as its *last* choice after air injec-

³⁶ There is no legal requirement that the cost of each particular component in a manufactured product (which in this case involves more than 15,000 separate parts) must be recovered independently in the pricing of the end product.

³⁷ Three other devices (all catalytic converters) had been conditionally certified at the same time as AMF's prototype device.

tion, Chrysler's engine modification system, and Walker's catalytic converter (Misch Dep. Ex. AHM 2; Chandler Dep. Ex. AJMC 36). Petitioner's claim (Pet. 18) that "defendants had no alternative to the AMF Smog Burner until mid-1965" is utterly without foundation or support in the record.³⁸

(d) Petitioner asserts that the defendants induced foreign automobile manufacturers to sign the Cross-Licensing Agreement in June, 1965 "precisely at the time AMF was trying to sell them its device" (Pet. p. 7). Even if this were true (and there is no evidence of record to support the claim of "inducement"), it would be irrelevant, because the Cross-Licensing Agreement in no way precluded any of its signatories from purchasing devices from AMF or anyone else. It provided merely for the interchange of information and joint cross-licensing among the signatories, without any bar against their use of the products of outsiders.³⁹ (Sherman Dep. Ex. 6). Moreover, petitioner overlooks the fact that it conceded below that foreign manufacturers were not parties to any boycott. (R. 3051).

Thus there is no support in the record for petitioner's inaccurate assertions of the continuance of conspiratorial

³⁸ Petitioner's references to "the potential preference for its device over defendants' costly and less effective system" (Pet. 7) and to "state law requir[ing] that all cars sold in the state be equipped with a certified device like plaintiff's" (Pet. 3) are equally imaginative.

³⁹ The Petition also asserts that General Motors made false representations to the Board with respect to the need for body changes to accommodate the certified devices. The representations referred to were not only not false, but related to the *Walker catalytic converter*—not the AMF afterburner—and, in any event, they were made in 1964 (R. 5234-35) and are of no help to petitioner's efforts to avoid the bar of the statute of limitations.

conduct into the statutory period. The rejection by the Court of Appeals of petitioner's contentions reflected an accurate understanding of the law and also of the weakness of petitioner's factual arguments. And apart from the merits, the court's application of undisputed legal principles to the particular facts of this case does not warrant review by this Court.

2. Petitioner's second contention is that the Court of Appeals incorrectly applied the *Zenith* "speculative damage" doctrine to the facts of this case. However, the Court of Appeals, as its opinion demonstrates, correctly understood the meaning of *Zenith*. That Court recognized that if unlawful acts take place outside of the limitations period, a plaintiff suffering future damages which are unprovable at that time and therefore unrecoverable within that period will be permitted to assert his cause of action to recover such damages when they are no longer purely speculative. In this respect, as with respect to petitioner's first contention, the Court of Appeals took its law directly from *Zenith*.

Zenith does not, however, mean that future damages, as to which there is always some uncertainty, can *never* be proved without waiting for the future to transpire, or that a plaintiff must wait until his damages are provable with *certainty* before filing suit. What the Court was concerned with in *Zenith* was the situation in which an attempt to measure future damages would have been so speculative that no damages at all could have been awarded. The Court's object was certainly not to postpone into the future those cases presently triable in which damages are awarded, despite inevitable inexactitudes, under the rule of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co. v. Paterson Paper*

Co., 282 U.S. 555, 562 (1931).⁴⁰ See also *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F. 570 (C.A. 4, 1976); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (C.A. 9), cert. denied 429 U.S. 1074 (1977).

Moreover, the Court of Appeals correctly applied the foregoing *Zenith* rule to the facts of this case. In the instant case, AMF had everything that it needed in order to sue in 1964, and it therefore does not fall within the *Zenith* exception. Furthermore, nothing that occurred after 1964 rendered AMF's proof of damages any less speculative, as both lower courts recognized.

By October 1964, for example, AMF knew that it had been rejected by each respondent; it knew that as a result it had lost its potential business on respondents' vehicles; it had as a further result put into effect "almost a complete reduction of personnel;" and it had converted its afterburner project to a "close-out basis." At that time, AMF was also able to predict "very, very precisely"—to use its own words—the total 1966 vehicle market, and it could clearly then have gone to a jury with the claim that it had

⁴⁰ As observed in *Monona Shores, Inc. v. United States Steel Corp.*, 374 F. Supp. 930, 936 (D. Minn. 1973):

"It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable. This court is aware that in some cases, and perhaps this is one, damages are better proven at a later time. However, that does not mean at an earlier point in time, enough evidence of damages was available to allow the issue to go to the jury. When there is enough evidence to allow the issue to go to a jury the damages are no longer speculative, notwithstanding that at a later time better evidence of damages might become available."

lost business and the profits that it would have earned therefrom.⁴¹ As AMF's own counsel argued below:

"We believe that in an open market that we would have got let's say 75 percent on the basis of the merit and the price of our device. The evidence will be the merits, it will be what their system cost them to put into effect.

"... we would be probably hard pressed to say that Chrysler would have bought it, the AMF device. I mean that is just on the matter of economics.

"Beyond that on the free market we think the rest would have. . . ."⁴²

AMF's present claim that respondents' 1964 rejections of AMF were "prospective and contingent" and that it therefore "would have been impossible as of January 10, 1965, for AMF to know whether it would ultimately suffer complete, partial or no exclusion from the state-mandated market for exhaust control devices" (Pet. 12), is patently false. In the first place, the 1964 rejections were blunt and explicit, not contingent. As stated by Mr. Lipchik, AMF's Vice President and the General Manager of the afterburner project, in a contemporaneous October 1964 letter to the California Board, for example:

"The fact remains, and *we have been told this in no uncertain terms by several of the automobile com-*

⁴¹ See also *Monona Shores, supra*, at 937:

"Plaintiffs certainly cannot be arguing that the *market value* of their interest was not damaged by the commencement of foreclosure proceedings. At that point in time they certainly could have gone to a jury with the claim that their interest had been destroyed. Expert appraisals are proper evidence in such cases although they might require predictions in making calculations."

⁴² Transcript of Proceedings of January 19, 1976, at 87-88.

panies, that they have no intention of using the AMF/Chromalloy device or any other independent device."⁴³

Moreover, the rejection by respondents was sufficiently clear to AMF for AMF to "cut back" its afterburner operation and to terminate its employees at the end of 1964; AMF did not wait until defendant's "certification" to take this action. Indeed, throughout the course of the litigation below AMF attempted to justify certain of its actions—including its refusal to attend the January 7, 1969 California Board exemption hearing—on the ground that it *knew* it was out of business prior to January 10, 1965.⁴⁴

Petitioner also hoists itself on its own petard when it argues that its damages were "speculative." Petitioner asserts that its damages were too speculative to have justified any recovery prior to January 10, 1965 because prior to then no one could forecast what its share of the market would be until it was known whether respondents' systems would be certified. But when they were and petitioner's was not, petitioner's possibility of proving damages was certainly not improved. If anything, the definiteness of petitioner's damages was reduced (arguably to zero) by these events, rather than increased—as the district court and the Court of Appeals explicitly found:

"Subsequent to 1964 AMF's ability to prove with requisite certainty the existence and amount of its alleged damages became more rather than less speculative" (Fdg. 91, Pet. Supp. App. 16b).

"No difficulties with projecting market share existed in late 1964 that do not exist today." (Pet. App. 14a).

⁴³ Letter from H. Lipchik to D. Jensen, October 29, 1964, p. 3. Lipchik Dep. Ex. 59. Mr. Lipchik further testified that AMF was aware its device would not be used "long before" this letter was written. Lipchik Deposition 158.

⁴⁴ R. 2921.

Accordingly, petitioner's damage claim is barred either by the statute of limitations or because it remains as speculative and unprovable today as petitioner now asserts it was on January 10, 1965.⁴⁵ Inasmuch as the result is the same in either event, no question important enough for this Court to review is presented.

Nor are the cases relied upon by petitioner—*Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (C.A. 2, 1971), *cert. denied*, 404 U.S. 1018; *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 128-39 (C.A. 3, 1978); and *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (C.A. 3, 1972)—inconsistent with the result below. In the first place, in each of those cases the speculativeness in the damages resulted not from the actions of the defendants alone but rather from uncertainty as to the future actions of others—a situation not present in the instant case. Moreover, in none of the cases cited by plaintiff did the passage of time render the plaintiff's proof of damages less, rather than more, certain.

In *Ansul*, the main case relied upon by plaintiff, for example, it could not be determined whether termination by a supplier had damaged a distributor until the willingness of others to supply the same products to the distributor, and at what price, was known. In the instant case, however, the 1964 rejections by respondents deprived AMF of its market on those vehicles without regard to the actions of others. The respondents *themselves*—not third parties—

⁴⁵ AMF's claim that certification of respondents' systems was so "speculative" an event as to prevent it from filing suit (Pet. 6-7, 18) leads to the same result. After all, no AMF production device was ever certified, and the AMF experimental device was decertified by California at the very start of the 1966 model year. If AMF is correct, therefore, in its claim that certification is so speculative an event as to bar filing its suit, then AMF is necessarily barred from the *present* suit by reason of its failure to obtain certification.

determined whether AMF would supply devices for use on their vehicles.

Similarly, in *Continental-Wirt* a cutoff of supply might or might not ultimately have forced plaintiff to discontinue business and to sell its assets, while in *Harold Friedman* an unlawful 1971 agreement between a supermarket chain and a shopping center forced plaintiff to vacate the center in 1974 and to suffer damages as a result of its inability to relocate until November 1975—"damages that could not be anticipated in 1971."⁴⁶ In the instant case, however, petitioner's exclusion as a result of respondents' independent 1964 rejections was readily and immediately apparent in 1964, as petitioner and its executives conceded below. The results in *Ansul*, *Continental-Wirt* and *Harold Friedman* are therefore not inconsistent with the result in this case.

3. The above analysis of the two substantive questions raised by the petition deals with the facts upon which petitioner relies for its contention that respondents were not entitled to summary judgment. It demonstrates that the facts asserted either have no support in the record or do not contradict the evidence upon the basis of which summary judgment was granted, much of which comes from the testimony of AMF's officials.

As is customary in antitrust cases, the party against whom summary judgment was granted has cited *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) and its progeny for the proposition that summary procedures should be used sparingly in such litigation. But when exhaustive discovery demonstrates that plaintiff has no case, summary judgment is as appropriate in antitrust cases as in others. *E.g.*, *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968).

⁴⁶ 587 F.2d at 139.

This case presents no general or important questions of law. It involves no conflict among the courts of appeals but only a challenge to the lower court's application of recognized principles to particular facts. Accordingly, certiorari should be denied.

Respectfully submitted,

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